KAMARUDDIN MAT DIRI

v.

PP

COURT OF APPEAL, PUTRAJAYA
ABDUL MALEK AHMAD PCA
ARIFIN ZAKARIA JCA
TENGKU BAHARUDIN SHAH JCA
[CRIMINAL APPEAL NO: C-09-13-1999]
16 MAY 2005

CRIMINAL PROCEDURE: *Charge - Amendment of - Date of alleged commission of rape altered at close of prosecution's case but before calling of defence's witnesses - Amended charge not immediately read to accused - Amended charge read to accused on a later date - Whether proper*

EVIDENCE: *Expert evidence - Qualifications of expert - Credentials of chemist - Whether a DNA expert for rape cases - Whether such facts must be specifically stated in evidence*

CRIMINAL PROCEDURE: *Trial - Calling of witnesses - Trial judge refusing to allow defence time to call DNA expert in rape case - Whether justified - Whether defence had had sufficient time to call own DNA expert*

EVIDENCE: *Witness - Calling of witness by defence - Trial judge refusing to allow defence time to call DNA expert in rape case - Whether justified - Whether defence had had sufficient time to call own DNA expert*

The accused was charged with raping his 12-year-old step-daughter ('the complainant') on 4 December 1994. It was the prosecution's case that the accused had raped the complainant on numerous occasions, the last time being on 4 December 2004, and that she had given birth to a child on 19 June 1995. At the close of the case for the prosecution, the sessions judge amended the date of the alleged rape as stated in the charge to "the beginning of September 1994". The accused was subsequently found guilty, convicted and sentenced to 18 years' imprisonment. On appeal before the High Court, the accused raised three principal issues, namely: (i) that the charge was not read to the accused after it was amended at the close of the case for the prosecution; (ii) that there were serious doubts as to the credentials of the chemist and the reliability of the DNA evidence he gave; and (iii) that the sessions judge had fallen into error in refusing to allow the defence time to call its own DNA expert.

Held (dismissing the appeal)
Per Abdul Malek Ahmad PCA delivering the judgment of the court:

[1] Although the charge was not read to the accused immediately upon its amendment on 19 July 1997, it was subsequently read to him on 27 November 1997 when he appeared before another sessions judge after several adjournments. There was thus no merit in the accused's first ground of appeal. (pp 183 h, 184 a, 185 e & 187 a)

[2] The accused's second ground of appeal was also without merit as there was absolutely no error on the part of the sessions judge in accepting the evidence of the chemist. (pp 185 f-h, 186 a & 187 b)

[3] The application by the defence to call its own DNA expert was made at a very late stage. The defence had had at least six months – from the time the accused was called upon to enter on his defence to the day on which the defence started to call its first witness – to find its own DNA expert. (pp 186 b-c & 187 c)

[Conviction and sentence affirmed.]

*[**Bahasa Malaysia** Translation Of Headnotes*

Tertuduh didakwa telah merogol anak tirinya ('mangsa') yang berumur 12 tahun pada 4 Disember 1994. Kes pendakwaraya adalah bahawa tertuduh telah beberapa kali merogol mangsa, dimana kali terakhirnya ialah pada 4 Disember 2004, dan bahawa mangsa telahpun melahirkan seorang bayi pada 19 Jun 1995. Pada akhir kes pendakwaraya, hakim mahkamah sesyen telahpun meminda tarikh mangsa dirogol sepertimana yang tercatat didalam kertas pertuduhan kepada "permulaan September 1994". Sekemudiannya, tertuduh telah didapati bersalah, disabit dan dijatuhkan hukuman penjara selama 18 tahun. Semasa rayuannya di hadapan Mahkamah Tinggi, tertuduh telah membangkitkan tiga isu utama, iaitu: (i) kertas pertuduhan tersebut tidak dibacakan semula kepada tertuduh setelah ianya dipinda pada akhir kes pendakwaraya; (ii) terdapat kesangsian yang serius terhadap qualifikasi ahli kimia tersebut dan juga keutuhaan keterangan DNA yang diberikannya; dan (iii) hakim mahkamah sesyen telahpun terkilas apabila enggan memberikan pihak pembela masa untuk memanggil pakar DNA mereka yang tersendiri.

Diputuskan (menolak rayuan)
Oleh Abdul Malek Ahmad PMR menyampaikan penghakiman mahkamah:

[1] Walaupun kertas pertuduhan tersebut tidak dibacakan semula kepada tertuduh dengan serta merta sejurus selepas ianya dipinda pada 19 Julai 1997, kertas pertuduhan tersebut telahpun di bacakan kepada tertuduh pada 27 November 1997 apabila tertuduh berhadir di hadapan seorang hakim mahkamah sesyen yang lain. Oleh yang demikian, alasan rayuan pertama tertuduh adalah tidak bermerit.

[2] Alasan rayuan kedua tertuduh juga tidak bermerit oleh kerana keputusan hakim mahkamah sesyen untuk menerima keterangan ahli kimia pihak pendakwaraya adalah keputusan yang betul.

[3] Permohonan pihak pembela untuk memanggil pakar DNAnya yang tersendiri telah dibuat terlalu lewat. Pada hakikatnya, pihak pembela mempunyai masa enam bulan untuk berbuat demikian, iaitu dari masa tertuduh dipanggil untuk memasukkan pembelaannya hinggalah ke masa pihak pembela mula memanggil saksi pertamanya.

[Kesabitan dan hukuman dikekalkan.]

Case(s) referred to:
Hee Nyuk Fook v. PP [1988] 2 MLJ 360 ***(refd)***
Junaidi Abdullah v. PP [1993] 3 MLJ 217 ***(refd)***
Kumaraguru & Ors v. PP [1994] 2 CLJ 53 HC ***(refd)***
PP v. Krishnan Letchumanan & Anor [1995] 2 MLJ 690 ***(refd)***
PP v. Mohammad Terang Amit [1999] 5 CLJ 156 HC ***(refd)***
Tan Foo Su v. PP [1967] 2 MLJ 19 ***(dist)***
Wong Chop Saow v. PP [1965] 31 MLJ 247 ***(refd)***

Legislation referred to:
Criminal Procedure Code, ss. 156, 158(ii), 167, 168, 173(h), (i), (j)
Evidence Ordinance 1950, s. 114(g)
Penal Code, ss. 420, 422

Other source(s) referred to:
Dr BR Sharma's Forensic Science in Criminal Investigation and Trials, pp 1117-1121
Field's Expert Evidence, Medical and Non Medical, 3rd edn, pp 107-121

For the appellant - Mura Raju; M/s Mura Raju & Co
For the respondent - Wong Chiang Kiat DPP

[Appeal from High Court, Temerloh; Criminal Appeal No: 42-03-1998]

Reported by Gan Peng Chiang

JUDGMENT

Abdul Malek Ahmad PCA:

The appellant was originally charged for raping his stepdaughter on 4 December 1994 between 12.30am and 2am at the house they were living in, when the victim was aged only 12 years 3 months. The victim's mother was the third wife of the appellant. The appellant's first and second wives stayed in neighbouring houses.

The victim's elder brother also stayed in that house from time to time as he was working somewhere else. It was he who told his stepmother on the date specified in the charge that the victim was in danger, as told to him by the appellant's first wife. He himself had seen the appellant clad in a blue towel sitting on the floor when he came home one night with the victim sleeping with her sarong above her thighs and the sleeping area in disarray.

On the night stated in the charge, with his father and stepmother, he had taken the victim back to his father's house. On the way home, the victim had told them all that had happened and that the appellant had raped her on a number of occasions.

The victim gave birth to a baby boy on 19 June 1995. She maintained that the appellant had raped her many times, including on Hari Raya and Merdeka Day, the last being on 4 December 1994. The victim's mother had seen the appellant fondling her breasts but did not do anything about it. She had testified that she did not see the appellant do anything wrong to the victim.

Blood samples were taken separately from the victim, the appellant and the baby boy and these were handed over to the chemist on 1 February 1996. On 19 February 1996, he had conducted DNA tests on all three blood samples and the results show that the appellant was the father of the baby boy, the probable paternity being 99.5 per cent.

At the close of the case for the prosecution, the court amended the charge to read that the rape took place at the beginning of September 1994 in view of the baby boy's birthdate. The defence was a total denial. He was found guilty and convicted by the Sessions Court for the offence charged and sentenced to 18 years' imprisonment with no whipping in view of his age.

As in the High Court, learned counsel for the appellant argued on three main issues before us. The first was that after the charge was amended, it was not read to the appellant. From the notes of evidence, it is not disputed that the court amended the charge on 19 July 1997 from "4 December 1994" to "the

beginning of September 1994" but there is no record of the amended charge being read. Thereafter, it was adjourned to 17 September 1997 when the learned Sessions Court Judge was not available, then to 24 September 1997 but the case did not go on. On 27 November 1997, the learned Sessions Court Judge was on leave but the appellant appeared before another judge where the amended charge was read to him. The case only continued on 22 January 1998.

In *Hee Nyuk Fook v. Public Prosecutor* [1988] 2 MLJ 360, the applicant was charged with the offence of cheating under s. 420 of the Penal Code, by dishonestly inducing one Wong Won Chong to deliver to the applicant cash of $40,000 for the purchase of a stolen Mercedes Benz motor car. During the course of the trial in the Sessions Court, the charge was amended twice. The first amendment made at the close of the prosecution case related to the particulars of the amount involved, from cash of $40,000 to $37,000. The amended charge was read over to the applicant but not explained to him. The second amendment was made after the close of the defence and submissions by the defence counsel and the prosecution. The charge was amended to include the words "cash cheque No. 271784 for a sum of $37,000". The amended charge was neither read nor explained to the applicant. The applicant was found guilty, convicted and sentenced. His appeal to the High Court was dismissed. The applicant was then granted leave to refer the following questions of law of public interest to the Supreme Court:

(a) where in the course of trial a charge is amended, is it mandatory to read and explain the amended charge to an accused person pursuant to the provision of s. 158(ii) of the Criminal Procedure Code?

(b) if the answer to (a) is in the affirmative, then is the omission to read and explain the amended charge to an accused person a mere irregularity which can be cured by recourse to s. 422 of the Criminal Procedure Code?

It was held that:

(a) the question whether s. 158(ii) of the Criminal Procedure Code is mandatory or directory depends on the facts and circumstances of a particular case, the purpose and object for which such provision is made, the intention of the legislature in making the provision and the serious inconvenience or injustice which may result in treating the provision one way or the other. No hard and fast rule can be laid down merely from the use of the word "shall" therein;

(b) applying the test to the facts and surrounding circumstances of the case, the provision of s. 158(ii) of the Criminal Procedure Code, in so far as this case is concerned, is not imperative but directory. The provisions contained therein only lay down a rule of procedure and do not relate to the mode of the trial. A *fortiori* in the light of the provision of s. 422 of the Code;

(c) the nature of the amendment being purely technical and in no way substantial has not rendered the omission to read over and explain the amended charge at the close of the defence a serious irregularity as to vitiate the proceeding or occasion a failure of justice;

(d) as regards the first amendment, there was no need for the amended charge to be explained to the applicant after it was read over to him by virtue of s. 173(h), (i) and (j) of the Criminal Procedure Code. As regards the second amendment, there was no need for the learned President to amend the charge at all at the end of the trial by virtue of s. 156 of the Code since the applicant would not be misled by such an omission. Further, ss. 167 and 168 of the Code empower the court to convict an accused person with an offence other than the offence charged or with an attempt to commit the said offence without the accused being separately charged. If at all there was any necessity, the failure to do so did not amount to an irregularity which has occasioned a failure of justice and in any way prejudiced the trial by virtue of s. 422 of the Code.

Accordingly, in view of the fact that the amended charge was subsequently read to the appellant here before he gave evidence and in the light of the authority cited, we found no merit in this objection.

The second point was the DNA evidence. Learned counsel for the appellant questioned the expertise of the chemist. The learned Sessions Court Judge had stated in her grounds of judgment that the Chemist had a degree in science with honours in chemistry from University Malaya and a masters in forensic science from the University of Strathclyde in the United Kingdom. Apart from being an associate of the Chemistry Institute, he had been giving evidence in court since 13 October 1978 and his evidence has been accepted by the courts. In this particular case, the learned Sessions Court Judge relied on *Public Prosecutor v. Krishnan a/l Letchumanan & Anor* [1995] 2 MLJ 690, *Kumaraguru & Ors. v. Public Prosecutor* [1994] 2 CLJ 53, *Field's Expert Evidence, Medical and Non Medical* 3rd edn at pp. 107 to 121 and *Dr. B.R. Sharma's Forensic Science in Criminal Investigation and Trials* at pp. 1117 to 1121. We are also mindful of *Public Prosecutor v. Mohammad Terang bin*

Amit [1999] 5 CLJ 156 which had made reference to *Wong Chop Saow v. Public Prosecutor* [1965] 31 MLJ 247 and *Junaidi bin Abdullah v. PP* [1993] 3 MLJ 217. We cannot in any way detect any fault in accepting the evidence of the chemist in this case and so the second objection must be overruled.

The third point was that being unhappy with the chemist's evidence, learned counsel for the appellant had asked for time to get their own DNA expert but this was not allowed by the learned Sessions Court Judge. But as pointed out by the learned High Court Judge in his judgment, the refusal was because the application to call the DNA expert for the appellant was made at a very late stage after the defence had called the appellant and his wife, the victim's mother, as witness. The learned Sessions Court Judge had stated in her notes that the defence was called on 19 July 1997 but the defence gave their testimony only on 22 January 1998 which was six months later and there was more than ample time for the appellant to get the DNA expert if he wanted to.

On this point, learned counsel for the appellant had referred to *Tan Foo Su v. Public Prosecutor* [1967] 2 MLJ 19 where the appellant was convicted of the offence of theft of some wooden beams and fined a sum of $300, in default three months' imprisonment. The appellant gave evidence on oath at the trial to the effect that the beams were given to him by a contractor named Kamal Ariffin and that he did not steal them from the complainant. Under cross-examination, he said that Kamal Ariffin had no land near his place and that he took the beams from the side of a bridge. Kamal Ariffin was not called as a defence witness and there was no mention in the record that the appellant had asked for an adjournment in order to call him.

It was held on appeal that the circumstances of this case warranted an adjournment so that the witness named by the appellant could be called and failure of the defence to produce a particular witness must not be made the subject of adverse comment by the court, otherwise it would amount to a misdirection. In that case, the appellant did not ask for an adjournment at all to call the witness named in the defence evidence and the trial court invoked the provision of s. 114(g) of the Evidence Ordinance 1950 and presumed that if the witness was called to give evidence, his evidence would be unfavourable to the appellant.

This, of course, is not applicable here as the complaint is from the appellant for not being able to call a witness because the application to do so was refused by the learned Sessions Court Judge in view of the delay in making the application. There was no question of any adverse inference made by the learned Sessions Court Judge for the failure to call the witness.

Again, we find no merit in this argument.

To reiterate, we were of the unanimous view that the amendment of the charge by the court at the close of the prosecution case was only as regards the month in view of the evidence adduced on the date of birth and although from the record it was not read at the time of the amendment, it had in fact been read out on a subsequent date before the defence opened its case. As for the expert evidence, we are satisfied from the testimony of the chemist that, being a forensic scientist, he is a DNA expert although he did not specifically state he was one. The refusal by the court to allow the defence time to call another DNA expert was justified in view of the six months lapse between the calling of the defence and when the defence actually opened its case.

We are also of the view that even without the DNA evidence, there was already sufficient evidence to convict the appellant. The appeal was dismissed and the conviction and sentence affirmed.